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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1544

RICHARD A. BOEHNING, individually and as Chairman Commissioner of the Indiana State Highway Commission,

JAMES S. DUMAS, individually and as Vice Chairman Commissioner of the Indiana State Highway Commission,

KERMIT GREGORY, individually and as Commissioner of the Indiana State Highway Commission,

HAROLD O. MCCUTCHAN, individually and as Commissioner of the Indiana State Highway Commission,

R. H. HARRELL, individually and as Executive Director of the Indiana State Highway Commission,

ROLAND L. KILLEBREW, individually and as Chief, Personnel Division of the Indiana State Highway Commission,

NICHOLAS VAN NIELEN, individually and as District Engineer of the Indiana State Highway Commission, and

ALBERT SCHEESSELE, individually and as Subdistrict Superintendent of Subdistrict 6-62 of the Vincennes District Highway Commission,

Petitioners,

vs.

INDIANA STATE EMPLOYEES ASSOCIATION, INC. an Indiana not-for-profit corporation, and PHYLLIS A. MUSGRAVE, individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
Facts Material to the Consideration of the Questions Presented	6
REASONS FOR ALLOWANCE OF THE WRIT	7
I. The Seventh Circuit Erred in Holding That Abstention by the District Court was Inappropriate	7
A. Abstention Generally	7
B. Unsettled Questions of State Law	8
C. Federal-State Friction	11
D. Impairment of State Functions	13
II. The Seventh Circuit Erred by Interpreting the Bi-Partisan Personnel Act to Support a Claim of Entitlement to Employment in the Plaintiff.	15
CONCLUSION	20

Page

APPENDIX

Opinion of Seventh Circuit dated March 10, 1975 ..A-1

Entry of District Court dated April 13, 1975 .....A-11

TABLE OF AUTHORITIES

Page

Cases

Alomar v. Dwyer, 447 F. 2d 482 (2nd Cir., 1971) 18

American Federation of State, County and Municipal Employees v. Shapp, 280 A. 2d 375 (1971) 18

Askew v. Hargrave, 401 U.S. 476 (1971) 8, 9

Baggett v. Bullitt, 377 U.S. 360 (1964) 8

Board of Regents v. Roth, 408 U.S. 564 (1972) 17, 18

Cafeteria & Rest. Workers U. Local 475 v. McElroy, 367 U.S. 886 (1961) 11, 16

City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1958) 10

Detroit Edison Co. v. East China Township School District No. 3, 378 F. 2d 225, (6th Cir., 1967) 13

Fornais v. Ridge Tool Co., 400 U.S. 41 (1970) 9

Harman v. Forssenius, 380 U.S. 528 (1965) 8

Harris v. Samuels, 440 F.2d 748 (5th Cir., 1971) 14

Hill v. City of El Paso, Texas, 437 F.2d 352 (5th Cir., 1971) 8

Hyde v. Board of Commissioners of Wells County, 198 N.E. 333 (Ind. Sup. Ct., 1935) 19

Indiana State Employees Association v. Boehning, 357 F. Supp. 1374 (S.D. Ind., 1974) 2, 6

Indiana State Employees Association v. Boehning, 511 F. 2d 834 (7th Cir., 1975) 2, 7

Indiana State Employees Association, Inc. v. Negley, 357 F. Supp. 38 (S.D. Ind., 1973) 19

Cases

	Page
Kiernan v. Lindsay, 334 F. Supp. 588 (S.D. N.Y., 1971)	12
Kirkpatrick v. King, 91 N.E. 2d 785 (Ind. Sup. Ct., 1950)	19
Lewellyn v. Gerhardt, Cause No. 74-1443, (7th Cir., March 21, 1975)	11
Martin v. Creasy, 360 U.S. 219 (1959)	14
Patrone v. Howland Local Schools Board of Education, 472 F. 2d 159 (6th Cir., 1972)	18
Perry v. Sinderman, 408 U.S. 593 (1972)	17
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)	8, 11
Reetz v. Bozanich, 397 U.S. 82 (1970)	9, 10, 12
Tilton v. Southwest School Corporation, 281 N.E. 2d 117 (Ind. App., 1972)	19
Tucker v. State, 235 N.E. 2d 162 (Ind. Sup. Ct., 1941)	19
Wetzel v. McNutt, 4 F. Supp. 233(S.D. Ind., 1933)	19

Constitutional and Statutory Provisions

Fourteenth Amendment to the Constitution of the United States	3
I.C. 1971, 4-15-2-1	16
I.C. 1971, 8-13-1.5-1	4, 16, 17
I.C. 1971, 8-13-1.5-5	4, 16, 17, 18
I.C. 1971, 8-13-1.5-6	4, 16, 17, 18
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1343(3)	5

Constitutional and Statutory Provisions—Continued

	Page
28 U.S.C. § 2101(c)	3
42 U.S.C. § 1983	5

Other Authorities

Rule 19(1)(b) of the Rules of the Supreme Court of the United States	2
Rule 65(a)(2) of the Federal Rules of Civil Procedure	6
Wilber F. Pell, Jr., "Abstention—A Primrose Path By Any Other Name," 21 DePaul L. Rev. 926 (1972)	8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Richard A. Boehning, individually and as Chairman Commissioner of the Indiana State Highway Commission; James S. Dumas, individually and as Vice Chairman Commissioner of the Indiana State Highway

Commission; Kermit Gregory, individually and as Commissioner of the Indiana State Highway Commission; Harold O. McCutchan, individually and as Commissioner of the Indiana State Highway Commission; R. H. Harrell, individually and as Executive Director of the Indiana State Highway Commission; Roland L. Killebrew, individually and as Chief, Personnel Division of the Indiana State Highway Commission; Nicholas Van Nielen, individually and as District Engineer of the Indiana State Highway Commission; and Albert Scheessele, individually and as Subdistrict Superintendent of Subdistrict 6-62 of the Vincennes District of the Indiana State Highway Commission; respectfully pray this Court issue a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seven Circuit), entered in cause number 73-1521 on March 10, 1975, which reversed and remanded the order and opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court.)

OPINION BELOW

The opinion of the Seventh Circuit issued on March 10, 1975, has been officially reported at 511 F. 2d 834 (7th Cir., 1975). A copy of the opinion of that Court has been appended hereto at page A-1. The April 13, 1973, Entry of the District Court has been reported at 357 F. Supp. 1374 (S.D. Ind. 1974), and is appended hereto at page A-11.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) and Rule 19 (1) (b) of the Rules

of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on an important state question in a way in conflict with applicable state law, and in a way in conflict with applicable decisions of this Court.

The decision of the Seventh Circuit was entered on March 10, 1975. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit erred in holding that abstention by the District Court was inappropriate?

2. Whether the Seventh Circuit erred in holding that the Indiana State Highway Commission Bipartisan Personnel System Act (hereafter Act), which has never been construed by the Courts of the State of Indiana, supports a claim of entitlement to notice and a hearing prior to termination of a state highway employee?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I.C. 1971, 8-13-1.5-1 provides:

> This chapter [8-13-1.5-1—8-13-1.5-8] shall be liberally construed to effectuate a bipartisan personnel system for the Indiana state highway commission. It is not the intent of this chapter to apply to those classifications covered by any program or is it the intent of the chapter to eliminate patronage in the employment practices of the highway commission for employees not covered by a specific merit statute. [I.C. 1971, 8-13-1.5-1, as added by Acts 1971, P.L. 92, § 1, p. 436.]

I.C. 1971, 8-13-1.5-5 provides:

> "The highway commission shall not have more than sixty per cent [60%] of the employees covered by this chapter [8-13-1.5-1—8-13-1.5-8], in each pay classification, and insofar as practicable, as adherents to any one [1] political party. To meet the requirements of this section, the commission is hereby authorized to discharge at least twenty per cent [20%] of all employees employed under the provisions of this chapter at the beginning of each governor's administration. If, in the opinion of the commission, rehiring of discharged employees is in the best interest of the commission, such employees may be reinstated. Employees that are retained or employed under the provisions of this chapter may be dismissed, demoted, suspended or laid off because of their political affiliation in order to achieve the political balance required by this chapter. It is the intent of this chapter, however, to emphasize stability of government through continuity of employment and career opportunity. [IC 1971, 8-13-1.5-5, as added by Acts 1971, P.L. 92, § 1, p. 436.]

I.C. 1971, 8-13-1.5-6 provides:

> "Any employee may be dismissed, demoted, suspended or laid off for cause. For the purpose of this chapter [8-13-1.5-1—8-13-1.5-8] cause shall be any action or inaction of any employee that produces, incurs or results in the substantial diminution of the employee's ability or willingness to perform his duties, impairs the ability or willingness of any other employee of the institution or agency of state government to perform his duties or brings discredit upon the state of Indiana. Cause may include but shall not be limited to the following:
>
> Intoxication on the job; physical or mental inability to perform the job requirements; personality characteristics which substantially limit the employee's or his fellow employee's ability to perform his duties, or which severely handicap the administration of the commission; and, action or inaction which severely limits or prohibits the implementation of administrative policies. [IC 1971, 8-13-1.5-6, as added by Acts 1971, P.L. 92, § 1, p. 436.]"

STATEMENT OF THE CASE

This case was brought in the District Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) by the Indiana State Employees Association, Inc. and Phyllis Musgrave (hereafter Plaintiffs) challenging the discharge of Plaintiff Musgrave from her employment as a stockroom clerk with the Indiana State Highway Commission (hereafter Commission). Plaintiffs alleged that Musgrave was entitled to notice and a pretermination hearing before discharge, and instituted their class action for a declaratory judgment, an injunction, damages and attorney fees. There was no challenge to the constitutionality of the Act. The Defendants were the members and officials of the Commission as well as the Executive Director, Chief of Personnel, a District Engineer and a Subdistrict Superintendent of the Commission.

Facts Material to the Consideration of the Questions Presented

The Complaint in this case was filed on March 6, 1973, along with a Motion for Temporary Restraining Order and supporting Memorandum. A hearing on that Motion was held on March 7, 1973, and defendants were unable to file a Memorandum in Opposition to the temporary restraining order on such short notice. The District Court denied the request for a temporary restraining order on March 7, 1975. On March 20, 1973, the Defendants filed a Motion to Dismiss with supporting Memorandum.

On April 2, 1973, under Rule 65 (a) (2) of the Federal Rules of Civil Procedure, the hearing on the preliminary injunction was consolidated with a trial on the merits. No pretrail briefs were filed by any party, and the post trial briefs filed by both sides on April 12, 1973, concerned only the question of the award of attorneys' fees to plaintiffs attorneys. The defendants did not file a brief on the merits since they had a Motion to Dismiss pending before the Court at the time of the April 2, 1973, hearing. Said motion was taken under advisement by the Court during that hearing.

On April 13, 1973 the District Court entered its Opinion and Order abstaining from deciding the merits of the case until the Courts of the State of Indiana had had an opportunity to determine whether Plaintiff Musgrave had a right to a pretermination hearing under Indiana law, 357 F. Supp. at 1378. The District Court did not rule on the class action allegations and denied Plaintiffs' request for attorneys' fees.

A timely appeal was filed in the Seventh Circuit, and on March 10, 1975, that Court held that the District Court should not have abstained, and reached the merits, stating

that the question presented there and in the State courts would be the "right to a hearing under the federal constitution." 511 F. 2d at 837, A 5. Thereupon, the Seventh Circuit concluded that the Act, which has never been interpreted by State Courts, "sufficiently supports a claim of entitlement to continued employment of employees in positions similar to Plaintiffs," 511 F. 2d at 837, A-7, and held that Plaintiff Musgrave was entitled to notice and a hearing. 511 F. 2d at 838, A-9.

The Seventh Circuit then ordered Plaintiff Musgrave reinstated and remanded the case to the District Court to determine if the Defendants were liable individually for damages. The Seventh Circuit expressed no opinion on the class action allegations and affirmed the denial of attorneys' fees.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Seventh Circuit Erred in Holding That Abstention by the District Court was Inappropriate

The initial point for both of the questions presented for review in this Petition is the interpretation of applicable laws of the State of Indiana. The Abstention Doctrine involves resolution of a problem under state laws to obviate any need for a federal constitutional determination, and the existence of a property interest in public employment is determined by state laws.

A.

Abstention Generally

Whether or not the abstention doctrine is to be applied is a determination made on a case-by-case basis, balancing

all the factors involved. *Baggett v. Bullitt,* 377 U.S. 360 (1964); *Hill v. City of El Paso, Texas,* 437 F. 2d 352 (5th Cir., 1971). Abstention in any particular case is a matter of the sound judicial discretion of a court's equity powers. See *Baggett v. Bullitt, supra, Harman v. Forssenius,* 380 U.S. 528 (1965); and *Askew v. Hargrave,* 401 U.S. 476 (1971).

In determining if abstention is proper, a court will consider all factors that are involved, weigh them and then make its decision. There is no "check list" involved to see if abstention should be applied nor to see if it was validly applied, but instead, abstention is a judicial determination balancing all aspects of a particular case. As the Honorable Wilber F. Pell, Jr. said in his article, "Abstention—A Primrose Path By Any Other Name," 21 DePaul L. Rev. 926, 934 (1972):

> "To the extent that determination of the correctness of abstention or nonabstention is truly a matter of discretion rather than a mechanical application of judicially established rules of thumb, some of which apparently have come along after the act, it would seem that the ordinary rules pertaining to evaluation of discretionary action should apply. *The test is said to be that a trial court's exercise of discretion may be set aside only if arbitrary or if no reasonable man would take the view adopted by the trial court.* Conversely, of course, if reasonable men could differ as to the propriety of the action taken, then it cannot be said that the trial court abused its discretion." (Emphasis supplied.)

B.

Unsettled Questions of State Law

The abstention doctrine originated in *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941). It was based

on "the avoidance of needless friction" between federal pronouncements and state policies. 312 U.S. at 500.

Since 1941, the federal courts have abstained from proceeding in many types of controversies, at least three of which were relevant here. The first is where an attack is made in federal court on a state law which has not yet been construed by the state courts. The theory of abstention in these cases is that (i) if the state statute is complicated an interpretation of the statute might avoid the constitutional issue, or (ii) if the state statute violates the state constitution, a decision by the federal court on the issue of federal constitutionality can be avoided. Recent examples of such cases are *Reetz v. Bozanich,* 397 U.S. 82 (1970), *Fornaris v. Ridge Tool Co.,* 400 U.S. 41 (1970), and *Askew v. Hargrave, supra.*

The statute involved in this cause has never been litigated in Indiana courts in regard to the question raised by the plaintiffs, i.e., is there a right to a pretermination hearing in the Bi-Partisan Personnel System Act. The Act is silent as to the question of a hearing, but plaintiffs asserted that such right exists. While plaintiffs did not attack the constitutionality of the Act, they did assert that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a hearing prior to dismissal in this cause.

The defendants would submit that the proper procedure in this instance was for the Federal courts to abstain from deciding this matter until the State courts have had the opportunity to consider several complex statutes which are capable of being interpreted in more than one way. Such interpretation might be that the State statute does create the requirement requested, but the State should be allowed the courtesy by the Federal courts to make such a deter-

mination. Once the State courts have acted the necessity for determination of the constitutional questions by the Federal courts might well be obviated.

In *Reetz v. Bozanich, supra,* the Court was "advised that the provisions of the Alaska constitution at issue have never been interpreted by an Alaska court." 397 U.S. at 86. This Court held that the district court should have abstained until the state courts had interpreted the state constitutional provision, quoting *City of Meridian v. Southern Bell Tel. & Tel. Co.,* 358 U.S. 639, 640-641 (1958):

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions . . . That is especially desirable where the questions of state law are enmeshed with federal questions . . . Here the state law problems are delicate ones, the resolution of which is not without substantial difficulty-certainly for a federal court . . . In such a case when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." 397 U.S. at 85."

In this case the Seventh Circuit, upon reaching the merits, found a claim of entitlement to public employment in Plaintiff Musgrave. That finding was made by construing a state statute (that has never been construed by Indiana Courts) to say that the statute provides a claim of entitlement in those employees whose discharge is not based upon political affiliation, even though the Act is primarily a patronage employment act.

It is well settled that there is no "right" as such to public employment, and that such employment can be revoked at the will of the appointing officer. *Cafeteria & Rest. Workers U. Local 475 v. McElroy,* 367 U.S. 886, 896 (1961). Thus, it would seem that a public employment statute that provides for discharge from that employment upon grounds of political affiliation, but which also provides for discharge due to "cause" is certainly an unclear statute that should first be construed by the Courts of the State of Indiana, the Courts with the expertise in construction of Indiana statutes.

The Seventh Circuit obviously recognizes the advantages of state court decisions of state law questions since eleven (11) days after deciding the case herein the Seventh Circuit vacated a decision by the same District Court in favor of the State Officials involved therein, stating:

> "For the reasons which we have given, we conclude that the cause be remanded to the district court with directions to that court to reinstate the cause of action herein and to enter an appropriate abstention order which postpones any decision of the federal question pending the determination by the state court of the state questions which are inherent in the fact situation presented."

Norman Lewellyn et al. v. Virgil H. Gerhardt, et al., Cause No. 74-1443, (7th Cir., March 21, 1975) Slip Opinion, page 5.

C.

Federal-State Friction

A second type of case in which the federal courts have abstained is where the assumption of federal court jurisdiction would have the possibility of unduly disrupting federal-state relations. As enunciated in *Railroad Commis-*

sion of Texas v. Pullman Co. supra., this type of abstention is meant to avoid needless federal-state friction. In discussing this area, Judge Pell said at page 950:

> "... Mr. Justice Frankfurter dwelt at some length on the subject in Pullman. He observed that few public interests have a higher claim on the discretion of a federal chancellor than the avoidance of needless friction with state policies. Referring to earlier cases, he stated that they reflected a doctrine of abstention appropriate to the federal system whereby the federal courts, exercising a wise discretion, restrained their authority because of scrupulous regard for the rightful independence of state governments and for the smooth working of the federal judiciary."

It is hard to imagine a situation that could cause more federal-state friction than one where, as here, the Seventh Circuit determined the "rights" of hundreds of state employees under a recently passed (1971) valid state statute which has never been challenged as unconstitutional and which the state courts have never had the opportunity to interpret.

In *Kiernan v. Lindsay*, 334 F. Supp. 588 (S.D.N.Y., 1971), an action brought by a New York City patrolman who had been placed on probation for violation of the Taylor Law's anti-strike provisions, the Court cited *Reetz v. Bozanich, supra*, and stated at page 597:

> "... The administrative process in this case involved the complex relationships between the State of New York and the public employees of that state. We should not unnecessarily intrude in such relationship. Coleman v. Ginsberg, supra, 428 F. 2d at 769.
>
> "The Taylor Law is not a casual piece of state legislation. It presents a comprehensive, substantive and procedural program for determining the rights and

> obligations of public employees and their public employers ....
>
> "As we have elaborated herein, a basic issue of the nature of the probation sanction has never been litigated in the state court ....
>
> "We therefore believe that federal intervention is highly inappropriate. Reetz v. Bozanich, 397 U.S. 82, 90 S. Ct. 788, 25 L.Ed. 2d 68 (1970)."

The Indiana Bi-Partisan Personnel Act is not a casual piece of state legislation. It is a comprehensive, substantive program dealing with public employment in the Indiana Highway Commission, and therefore the Seventh Circuit should have affirmed the abstention and refrained from creating unnecessary federal-state friction by not intruding into the complex affairs of the State of Indiana and its public employees.

D.

Impairment of State Functions

The third area of abstention cases relevant to this cause are cases where the exercise of federal jurisdiction would bring the federal judiciary into conflict with a state in the administration of its own affairs so as to impair state functions. As the Sixth Circuit has stated in *Detroit Edison Co. v. East China Township School District No. 3*, 378 F. 2d 225 (6th Cir. 1967) at 229 and 230:

> "Federal courts generally abstain from exercising jurisdiction in order to avoid conflict with the administration by a state of its own affairs. See 1 Barron & Holtzoff, Federal Practice and Procedure § 64 (Wright ed. 1960)."
>
> "In Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407 (1943),

> plaintiffs sought a declaratory judgment regarding the constitutionality of a state tax. The Court reiterated the principle that 'scrupulous regard for the rightful independence of state governments • • • should at all times actuate the federal courts,' the guideline being the reluctance to interfere with a state's 'fiscal operations' or with 'state internal economy and administration.' Id. at 298, 63 S. Ct. at 1073."

See also *Martin v. Creasy,* 360 U.S. 219 (1959), and *Harris v. Samuels,* 440 F. 2d 748 (5th Cir., 1971).

The matter involved herein is the employment practices of the State of Indiana, a matter that should be left to the State in the internal administration of its own affairs.

The Seventh Circuit ignored these points however, and stated at 511 F. 2d at 836 and 837, A-5:

> "Where, as here, no such substantial question as to the applicable state law can be identified, 'abstention is equivalent to an impermissible requirement of exhaustion of state remedies." *Drexler, supra,* 504 F. 2d p. 839. The right to a hearing under the federal constitution is the question presented in this action, and the same question would be presented if plaintiffs were required to bring an action in an Indiana court. Under these circumstances, abstention by a federal court is inappropriate. *McNeese v. Board of Education,* 373 U.S. 668, 674 (1962)."

Thus, the Seventh Circuit stated at one point that abstention was improper since the right to a hearing under the federal constitution was the question, and then stated at a later point (511 F. 2d at 837, A-7) that its interpretation of the Act of the State of Indiana in question "supports a claim of entitlement to continued employment" to Plaintiff Musgrave.

By this action, the Seventh Circuit has undertaken the "duty" to interpret statutes of the State of Indiana that were *never challenged as unconstitutional* in the matter pending before it, prior to any consideration of those statutes by the courts of Indiana. This, the Petitioners would emphatically assert, is clear error, and requires that the judgment of the Seventh Circuit be vacated and the judgment of the District Court affirmed.

II.

The Seventh Circuit Erred by Interpreting the Bi-Partisan Personnel Act to Support a Claim of Entitlement in the Plaintiff

Upon reaching the merits in this cause the Seventh Circuit stated at 511 F. 2d at 837, A-6 and 7:

> "DUE PROCESS
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).
>
> "Proof of the legitimacy of a claim of entitlement 'would obligate . . . officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." Perry v. Sindermann, 408 U.S. 593, 603 (1973).
>
> "We conclude that the Indiana State Highway Commission Bipartisan Personnel System Act sufficiently supports a claim of entitlement to continued employment of employees in positions similar to plaintiff's ...."

The three (3) sections of the Act quoted above, I.C. 1971, 8-13-1.5-1, -5 and -6, show that there was no intent on the part of the General Assembly of the State of Indiana to create a civil service system or to create any entitlement in individual employees. For example, I.C. 1971, 8-13-1.5-1 states that it is not the intent of the Act to eliminate patronage from the employment practices of the highway commission, and I.C. 1971, 8-13-1.5-5 provides for the discharge of up to 20% of the employees covered by the Act at the beginning of each governor's administration. Thus, it is apparent that any employee covered by the Act is subject to dismissal simply because of his political affiliation. Therefore, those employees covered by that Act cannot have any entitlement.

When the Bi-Partisan Personnel System is considered as a whole, it is manifest that it is not an attempt to inhibit the practice of patronage employment or to bestow employment security or tenure on any individual. The Indiana Legislature has demonstrated its ability to clearly express the intent to provide secured civil service employment when it desires to do so. See, e.g. IC 1971, 4-15-2-1, et seq.

In *Cafeteria & Rest. Workers U. Local 475 v. McElroy, supra,* the Court stated at page 896:

> "It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. *In the Matter of Hennen,* 13 Pet. 230, 246, 259, 10 L. Ed. 138; *Crenshaw v. United States,* 134 U.S. 99, 108, 10 S. Ct. 431, 434, 33 L. Ed. 825; *Parsons v. United States,* 167 U.S. 324, 331-334, 17 S. Ct. 880, 882-883, 42 L. Ed. 185; *Keim v. United States,* 177 U.S. 290, 293-294, 20 S. Ct. 574, 575, 44 L. Ed. 774; *Taylor and Marshall v. Beckham* (No. 1), 178 U.S. 548, 575, 578, 20 S. Ct. 890, 900-901, 44 L. Ed. 1187. This principle

> was reaffirmed quite recently in *Vitarelli v. Seaton,* 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012. There we pointed out that Vitarelli, an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, 5 U.S.C.A. 632 et seq., 'could have been summarily discharged by the Secretary at any time without the giving of a reason • • •.' 359 U.S. at page 539, 79 S. Ct. at page 97."

It was the burden of the Plaintiffs to demonstrate that Musgrave had a constitutionally protected interest, and the Plaintiffs did not satisfy that burden. As the Court said in *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972):

> "Property interest, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

In order to determine whether due process notice and hearing requirements apply, one must examine not the "weight" but the "nature" of the interest at stake. *Roth, supra,* 408 U.S. at 570 and 571. The nature of the interest in *Perry v. Sinderman,* 408 U.S. 593 (1972), was constituted by an environment of rules and understandings, fostered by state officials, that justified Sinderman's claim to continued employment in the absence of proper cause to terminate his employment. In contrast, an employee subject to the Bi-Partisan Personnel System can be dismissed summarily under IC 1971, 8-13-1.5-5, and in accordance with the will of the appointing authority under IC 1971, 8-13-1.5-1. Such an employee can also be dismissed for the broadly described causes in IC 1971, 8-13-1.5-6, which does not purport to limit dismissals to the causes it describes.

The Plaintiffs have not established a property right such as that in *Sinderman* which rested upon the finding of a right of continued employment that existed because of a reasonable expectancy derived from a *de facto* tenure system, but instead merely alleged a property right in the expectancy itself. Under the cases of this Court, that is not sufficient showing since more than a unilateral expectation must be demonstrated. *Roth, supra,* 408 U.S. at 577.

The Seventh Circuit has chosen to undertake construction of an Indiana statute, and totally failed to cite any Indiana law in support of its construction. It has disected and construed the Act by ignoring the major portion which deals with patronage employment. The Court found a claim to entitlement based upon the fact that there are two types of discharge listed in Sections 5 and 6 of the Act, and stated that:

> ". . . This surely must be true in the case of an employee whose discharge is not based on political affiliation under Sec. 5. It follows that Plaintiff Musgrave was entitled to notice and hearing before discharge . . ."

The Court passed over the effect of the portion of the Act dealing with patronage by simply stating that it "is limited in its effect by the fact that a governor's term is four years." 511 F. 2d at 838, A-8. The fact is that the Indiana Legislature has developed a variety of employment programs and that that approach is not constitutionally objectionable. Cf. *Patrone v. Howland Local Schools Board of Education,* 472 F. 2d 159, 160 (6th Cir. 1972). A public employee has no inherent right to continuity of employment, *Alomar v. Dwyer,* 447 F. 2d 482, 483 (2nd Cir. 1971); *American Federation of State, County and Municipal Employees v. Shapp.,* 443 Pa. 527, ——, 280 A. 2d 375, 377,

and any employee claiming such an inherent right must certainly show more than the mere fact of employment for a governmental department, which is all that was shown here by Plaintiff Musgrave.

Indiana follows the general rule that only legislation offers tenure to public employees since no inherent property right exists for such employment. *Hyde v. Board of Commissioners of Wells County* (1935), 209 Ind. 245, 198 N.E. 333; *Tilton v. Southwest School Corporation* (1972), —— Ind. App. ——, 281 N.E. 2d 117; *Wetzel v. McNutt* (1933), 4 F. Supp. 233; *Kirkpatrick v. King* (1950), 228 Ind. 236, 91 N.E. 2d 785. The executive and administrators have the general power of appointment, *Tucker v. State* (1941), 250 Ind. 119, 235 N.E. 2d 162, and this principle has been upheld as recently as 1973. *Indiana State Employees Association, Inc. v. Negley* (S.D. Ind. 1973), 357 F. Supp. 38; *ibid.*, 365 F. Supp. 225, *aff'd* 501 F. 2d 1239 (7th Cir. 1974).

Thus, the Seventh Circuit should not have attempted the construction of a statute of the State of Indiana, but should have affirmed the District Court's Order of abstention.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 73-1521

INDIANA STATE EMPLOYEES ASSOCIATION, INC., an Indiana not-for-profit corporation, and PHYLLIS A. MUSGRAVE, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

RICHARD A. BOEHNING, individually and as Chairman Commissioner of the Indiana State Highway Commission,

JAMES S. DUMAS, individually and as Vice Chairman Commissioner of the Indiana State Highway Commission,

KERMIT GREGORY, individually and as Commissioner of the Indiana State Highway Commission.

HAROLD O. MCCUTCHAN, individually and as Commissioner of the Indiana State Highway Commission,

R. H. HARRELL, individually and as Executive Director of the Indiana State Highway Commission,

ROLAND L. KILLEBREW, individually and as Chief, Personnel Division of the Indiana State Highway Commission,

NICHOLAS VAN NIELEN, individually and as District Engineer of the Indiana State Highway Commission, and

ALBERT SCHEESSELE, individually and as Subdistrict Superintendent of Subdistrict 6-62 of the Vincennes District Highway Commission,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana — No. IP 73 C 99
Honorable James E. Noland, *Judge.*

ARGUED APRIL 16, 1974 — DECIDED MARCH 10, 1975

Before, FAIRCHILD, *Chief Judge,* PELL and STEVENS *Circuit Judges.*

FAIRCHILD, *Chief Judge.* This appeal was taken from an order of the district court abstaining from decision

on the merits until the Indiana courts have had an opportunity to construe certain Indiana statutes. Plaintiffs (appellants) are the Indiana State Employees Association, Inc., and Phyllis Musgrave, a discharged highway commission employee. Defendants (appellees) are members and officials of the Indiana State Highway Commission. Plaintiffs brought this action as a class action. They sought damages on account of the Musgrave discharge, a declaratory judgment, injunction and attorney's fees. They claim that plaintiff Musgrave was dismissed from state employment in violation of a federal due process right to a pretermination hearing. On appeal they argue that the district court improperly invoked the doctrine of abstention.

APPELLATE JURISDICTION

We have recently held that an abstention order like this one, though not a dismissal, is appealable as a final judgment. *Drexler v. Southwest Du Bois School Corporation,* .... F.2d .... (7th Cir. No. 72-1918, Oct. 15, 1974), slip opinion, p. 3.

ABSTENTION

After trial, the district court held that abstention was appropriate and declined to decide the merits "until the Indiana courts have an opportunity to consider the applicability of and authoritatively construe the Bipartisan Personnel System Act [Ind. Code 8-13-1.5 (1973)] and/or the Administrative Adjudication and Court Review Act [Ind. Code 4-22-1 (1973)] in determining whether employees of the Indiana State Highway Commission have a right to a pre-discharge hearing under Indiana law." *Indiana State Employees Association, Inc. v. Boehning,* 357 F.Supp. 1374, 1378 (S.D. Ind. 1973). For the reasons which follow, we reverse the decision to abstain and reach the merits.

The Administrative Adjudication and Court Review Act prescribes the procedure to be followed by state agencies, including notice and an opportunity to be heard and present evidence, in the course of "administrative adjudication." By definition "administrative adjudication" generally excludes "the dismissal or discharge of an officer or employee by a superior officer" except that it includes "hearings on discharge or dismissal of an officer or employee for cause where the law authorizes or directs such hearing."

The Bipartisan Personnel System Act applies to the State Highway Commission. Section 5 provides that the commission shall not have more than 60% of the employees in each pay classification, as adherents to any one political party, and "[To] meet the requirements of this section, the commission is hereby authorized to discharge at least twenty per cent [20%] of all employees employed under the provisions of this chapter at the beginning of each governor's administration." It also provides in Sec. 6 that any employee may be dismissed, demoted, suspended or laid off for cause (thereafter defined). The statute does not, in terms, authorize or direct a hearing for either type of dismissal, and therefore the motion and hearing provisions of the Administrative Adjudication Act do not apply. Defendants claim justification for discharge of Ms. Musgrave only under the "for cause" provision. She was denied a hearing.

Defendants point out that these statutes have not been construed by the Indiana courts, but they do not point out any area of doubtful meaning or outline an arguable construction of either or both Acts which would, as a matter of state law, entitle plaintiff to a hearing or a remedy for lack of one. If the action were brought in an Indiana court, that court would presumably address the question

whether the due process clause of the Fourteenth Amendment would require a hearing, but that would be adjudication of the same claim of federal right advanced in this action, and not a resolution of any real question of state common, statutory, or constitutional law identified as such by the district court or by counsel.[1] As we read Sec. 5 of the Act, there may well be questions of construction as to exactly how it is designed to work in particular situations, and these, of course, are state law questions, but we do not perceive, nor have counsel suggested, how the resolution of those questions would affect the question of entitlement to notice and hearing as a matter of due process.

"Abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim." *Zwickler v. Koota,* 389 U.S. 241, 251 (1967). Rights under the federal constitution are the proper subject of adjudication by federal courts. That jurisdiction may not be declined simply because the federal right may be asserted and vindicated in some other forum. *McNeese v. Board of Education,* 373 U.S. 668, 672 (1962).

Only in "special circumstances" may the federal court abstain from deciding a properly presented federal question. One set of such circumstances may possibly exist when a state statute is alleged to be unconstitutional. The susceptibility of the statute to a clarifying construction that would alter or eliminate the constitutional question might justify abstention by the federal court. *Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 510 (1972); *Zwickler v. Koota,* 389 U.S. 241, 249 (1967). Another such set of circumstances may exist when a claimant asserts that the defendant's act is in violation of state law as well as federal constitutional law. The necessity for ruling on the constitutional question would be avoided if a definitive ruling on the state issue would resolve the controversy. *See Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496; *Reetz v. Bozanich,* 397 U.S. 82 (1970). "Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe." *Wisconsin v. Constantineau,* 400 U.S. 433, 438 (1971).

[1] This case does not present an issue unclear under state law. "The court holds today only a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. . . . If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing. . . ." *Perry v. Sindermann,* 408 U.S. 593, 603, (1972), Chief Justice Burger, *concurring.*

Where, as here, no such substantial question as to the applicable state law can be identified, "abstention is equivalent to an impermissible requirement of exhaustion of state remedies." *Drexler, supra,* slip opinion, p. 4. The right to a hearing under the federal constitution is the question presented in this action, and the same question would be presented if plaintiffs were required to bring an action in an Indiana court. Under these circumstances, abstention by a federal court is inappropriate. *McNeese v. Board of Education,* 373 U.S. 668, 674 (1962).

The matter was fully tried before the district court decided to abstain. The facts are almost entirely stipulated. The parties have briefed and argued here the merits question whether plaintiff Musgrave had the type of interest in her employment so that her dismissal without a hearing was a denial of due process. Since there are no unresolved issues of fact relating to this question of law, we think it appropriate to decide it here.

FACTS

Plaintiff Musgrave was hired by the Commission as stockroom clerk at the Dale Garage January 19, 1970. In February, 1973 she was notified by defendant Scheessele that her employment would be terminated. She requested a hearing, but her request was denied. Defendants claim she was fired for cause. It is stipulated that her political affiliation is not at issue and that the employee who replaced plaintiff is affiliated with the same political party as plaintiff. Defendants take the position that no hearing need be held upon the request of any employee covered by the Bipartisan Personnel System Act prior to the dismissal of such employee.

DUE PROCESS

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).

Proof of the legitimacy of a claim of entitlement "would obligate . . . officials to grant a hearing at his request, where he could be informed of the grounds for his nonretenotion and challenge their sufficiency." *Perry v. Sindermann,* 408 U.S. 593, 603 (1972).

We conclude that the Indiana State Highway Commission Bipartisan Personnel System Act sufficiently supports a claim of entitlement to continued employment of employees in positions similar to plaintiff's. Section 6 of the Act authorizes dismissal for cause, and describes the type of conduct which constitutes cause.[2] If this were the only ground for dismissal provided by the Act, there could be no question, under the modern cases, of the legitimacy of an employee's claim of entitlement to continued employment, and of his due process right to notice and an opportunity to be heard before dismissal.

Section 5 of the Act authorizes dismissal of employees on account of their political affiliation for the purpose of achieving a balance of the proportion of employees

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[2] IND. CODE 8-13-1.5-6 (1973): "Dismissal of employees for cause.—Any employee may be dismissed, demoted, suspended or laid off for cause. For the purpose of this chapter [8-13-1.5-1—8-13-1.5-8] cause shall be any action or inaction of any employee that produces, incurs or results in the substantial diminution of the employee's ability or willingness to perform his duties, impairs the ability or willingness of any other employee of the institution or agency of state government to perform his duties or brings discredit upon the state of Indiana. Cause may include but shall not be limited to the following:

Intoxication on the job; physical or mental inability to perform the job requirements; personality characteristics which substantially limit the employee's or his fellow employee's ability to perform his duties, or which severely handicap the administration of the commission; and, action or inaction which severely limits or prohibits the implementation of administrative policies."

adhering to different political parties.[3] We are not confronted in this case with a challenge to this system on First Amendment grounds. *See Illinois State Employees Union, Council 34, Etc. v. Lewis,* 473 F.2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 928, 943. Assuming (without deciding) its validity, it creates a risk of loss of employment for reasons other than cause. But even such discharges must serve the particular purpose of maintaining political balance, and the authority "to discharge at least twenty percent [20%] of all employees employed under the provisions of this chapter at the beginning of each governor's administration," while substantial in number, is limited in its effect by the fact that a governor's term is four years.

The specification of authority to discharge for two types of grounds in Secs. 5 and 6 of the Act clearly implies exclusion of other grounds. In our judgment the limitation to these two types of grounds are sufficient to support a claim of entitlement under the principles stated in *Roth* and *Sindermann.* This surely must be true in the case of

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[3] 8-13-1.5-5 [36-163g]. "Limitation of number of employees of same political affiliation.—The highway commission shall not have more than sixty per cent [60%] of the employees covered by this chapter [8-13-1.5-1—8-13-1.5-8], in each pay classification, and insofar as practicable, as adherents to any one [1] political party. To meet the requirements of this section, the commission is hereby authorized to discharge at least twenty per cent [20%] of all employees employed under the provisions of this chapter at the beginning of each governor's administration. If, in the opinion of the commission, rehiring of discharged employees is in the best interest of the commission, such employees may be reinstated. Employees that are retained or employed under the provisions of this chapter may be dismissed, demoted, suspended or laid off because of their political affiliation in order to achieve the political balance required by this chapter. It is the intent of this chapter, however, to emphasize stability of government through continuity of employment and career opportunity."

an employee whose discharge is not based on political affiliation under Sec. 5. It follows that plaintiff Musgrave was entitled to notice and hearing before discharge.[4] Plaintiff Musgrave is entitled to reinstatement. The Eleventh Amendment prevents a judgment awarding her back pay or damages out of the state treasury. *Edleman v. Jordan,* 415 U.S. 651 (1974). The questions whether and to what extent she may be entitled to judgment for damages from individual defendants are left open for determination upon remand.

CLASS ACTION

Plaintiff Musgrave and the Indiana State Employees Association brought this suit as a class action claiming the applicability of Rule 23, F.R.Civ.P. Plaintiffs do not define the parameters of the class represented other than by designations "individuals similarly situated" and "employees governed by the Bipartisan Personnel System Act." Nor have they demonstrated how they fulfil the various requirements of Rule 23. The district court did not reach the issue of whether this suit is to be maintained as a class action. Rule 23(c)(1), F.R.Civ.P. We express no opinion whether this action is to be maintained as a class action upon remand.

ATTORNEY'S FEES

Subject to limited exceptions, the American rule is that courts will not ordinarily charge a litigant with the attorney's fees of his prevailing opponent unless author-

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[4] In this instance the employees' property interest in employment was not expressly conditioned by procedural limitations accompanying the grant of the interest. *Cf. Arnett v. Kennedy,* 416 U.S. 134, 155 (1974).

ized to do so by a statute or by an enforceable agreement between the parties. Exceptions to the rule are set out by the Supreme Court in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1966) and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). This court discussed the awarding of attorneys' fees in *Walker v. Columbia Broadcasting*, 443 F.2d 33 (7th Cir. 1971).

The present case does not present a situation where the *stare decisis* or estoppel effect of a judgment that a pre-dismissal hearing is required will establish as a matter of law the right of a class of persons to collect upon individual substantive claims. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, supra, at 719; *Hall v. Cole*, 412 U.S. 1, 6 (1973). Nor is there a class which would benefit from the preservation of a *res*, an award from which would spread the costs of attorneys' fees proportionately among the benefited class members. *Mills v. Electric Auto-Lite Co., supra*, at 394. To implement a strong statutory policy, awarding attorneys' fees may be the only available incentive to encourage private suits for non-monetary remedies. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). See *Hairston v. R & R Apartments*, F.2d .... (7th Cir. No. 74-1449, February 19, 1975). This is not such a case. Comparison of resources of the parties is a factor that of itself does not establish a legal basis for the award of attorney's fees. Accordingly, we conclude that allowance of attorney's fees is to be denied.

The order appealed from is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

INDIANA STATE EMPLOYEES ASSOCIATION, INC., et al.

v.

RICHARD A. BOEHNING et al.

No. IP 73-C-99.

United States District Court,
S. D. Indiana,
Indianapolis Division.

April 13, 1973.

ENTRY

NOLAND, District Judge.

The above entitled cause came before the Court for hearing on April 2, 1973, on plaintiffs' motion for preliminary injunction and other pending motions. At the beginning of said hearing, plaintiffs withdrew their discovery motions and the Court granted plaintiffs' motion for consolidation of trial on the merits with the hearing on the application for preliminary injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, taking defendants' motion to dismiss under advisement. For the reasons which follow, the scope of this entry is limited to a discussion of the propriety of applying the abstention doctrine in this cause.

Plaintiffs allege jurisdiction based upon 28 U.S.C. § 1343 (3), (4) and seek injunctive relief and monetary damages pursuant to 42 U.S.C. § 1983 and declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202. The central issue presented to the Court is whether plaintiff Phyllis A. Musgrave and others similarly situated have been denied due process of law under the Fourteenth Amendment by the

policy and practice of the Indiana Highway Commission of discharging employees summarily and denying them a prior hearing to determine whether such employees are being discharged in accordance with the provisions of the Indiana State Highway Commission—Bi-Partisan Personnel System, IC 1971, 8-13-1.5-1. The underlying factual dispute between the parties concerns whether there was sufficient cause for the termination of plaintiff Musgrave's employment pursuant to IC 1971, 8-13-1.5-6.

IC 1971, 8-13-1.5-6 provides as follows:

> "Dismissal of employees for cause.—Any employee may be dismissed, demoted, suspended or laid off for cause. For the purpose of this chapter [§§ 36-163c—36-163j] cause shall be any action or inaction of any employee that produces, incurs or results in the substantial diminution of the employee's ability or willingness to perform his duties, impairs the ability or willingness or any other employee of the institution or agency of state government to perform his duties or brings discredit upon the State of Indiana. Cause may include but shall not be limited to the following:
>
> Intoxication on the job; physical or mental inability to perform the job requirements; personality characteristics which substantially limit the employee's or his employee's ability to perform his duties, or which severely handicap the administration of the commission; and, action or inaction which severely limits or prohibits the implementation of administrative policies. [IC 1971, 8-13-1.5-6. as added by Acts 1971, P.L. 92, § 1, p. 436.]"

Plaintiffs contend that the foregoing section of the Bi-Partisan Personnel System Act gave Mrs. Musgrave the due process right to a pre-discharge hearing to determine

whether cause for her dismissal existed. The defendants, on the other hand, deny that any such right exists.

The Bi-Partisan Personnel System Act is silent on the question of whether a hearing is required before dismissal for cause, and no Indiana court has had the opportunity to construe the Act and resolve this uncertainty. Furthermore, no Indiana court has had occasion to consider whether the Administrative Adjudication and Court Review Act, IC 1971, 4-22-1-1 *et seq.*, Ind.Stat.Anno. § 63-3001 *et seq.* (Burns' 1961 Repl.) is applicable to the Bi-Partisan Personnel System, thus establishing not only the right to a pre-discharge hearing but also setting forth the procedures for such administrative hearings and determinations and providing for judicial review in the Indiana courts.[1]

It is the opinion of the Court that should the Administrative Adjudication and Court Review Act be construed to apply to the Bi-Partisan Personnel System, then plaintiff would have a right to a pre-discharge hearing as a matter of Indiana law. Such construction of Indiana law would, therefore, obviate the need for this Court to pass upon the federal constitutional issue of whether plaintiffs' due

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[1] The intent of the Administrative Adjudication and Court Review Act is expressed in IC 1971, 4-22-1-1; Ind.Stat. Anno. § 63-3001 (Burns' 1961 Repl.) as follows:

> "It is the intent to establish a uniform method of administrative adjudication by all agencies of the state of Indiana, to provide for due notice and an opportunity to be heard and present evidence before such agency and to establish a uniform method of court review of all such administrative adjudication."

process rights were violated by defendants' refusal to grant such a hearing.[2]

Given this situation, the propriety of abstention is well illustrated by Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 640, 79 S.Ct. 455, 456, 457, 3 L.Ed.2d 562, and Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 789-790, 25 L.Ed. 2d 68 (1970) wherein the Supreme Court stated that:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. * * * That is especially desirable where the questions of state law are enmeshed with federal questions. * * * Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court. * * * In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."

[2] In reviewing approximately 102 appellant court cases in which the abstention doctrine was invoked, Judge Pell made the following observation in his comprehensive survey of abstention decisions:

"Of the cases in which the district courts did abstain, by far the most frequent specific reason given was to avoid having to rule on a federal constitutional question when an authoritative decision on a question of state law would eliminate or substantially modify the federal question (34 cases). In 17 cases, the district courts specifically mentioned the availability of a state remedy, either administrative or judicial, as grounds for abstaining; 15 cases noted that the state courts were already handling the problem properly. Finally, 18 cases specifically opted for allowing a state court the first opportunity to construe a state statute." Pell, Abstention—A Primrose Path by any other Name, 21 DePaul L. Rev. 926 (1972).

The facts in the instant case are highly analogous to those before the Supreme Court in *Reetz*. Plaintiff Musgrave claims to have a property interest under the Bi-Partisan Personnel System Act which establishes personnel policies regulating employment with Indiana State Highway Commission. In addition to the enunciation of specific policies, the Act makes provision for rule-making authority as follows:

> "Rule for bipartisan personnel system.—The Indiana state highway commission shall enforce, through the executive director, the provisions of this chapter [§§ 36-163c—36-163j] and shall have the power to promulgate all rules necessary for the most effective administration of a bipartisan personnel system established by this chapter." IC 1971, 8-13-1.5-2.

Although the Indiana State Highway Commission has not exercised this rule-making authority and has denied the existence of a right to a pre-discharge hearing under the Bi-Partisan Personnel System, an Indiana court of competent jurisdiction could well conclude that the aforementioned rule making powers of the Commission extend to dismissal for cause (see IC 1971, 8-13-1.5-6 set forth *supra*) and require the Commission to exercise those powers to establish procedures for pre-termination hearings in conformity with the policies embodied with the Act and the

Indiana Constitution.[3] Similarly, an Indiana Court of competent jurisdiction could well conclude that despite the rule-making authority vested in the Highway Commission, the Administrative Adjudication and Court Review Act is applicable to the Bi-Partisan Personnel System Act, and that the Commission must therefore conduct pre-discharge hearings in accordance with the detailed provisions of the Administrative Adjudication and Court Review Act. Finally, it is possible that an Indiana court ruling on these issues would conclude that employees of the Indiana State Highway Commission do not have a right to a pre-termination hearing because of the silence of the Bi-Partisan Personnel System Act on this subject.

From the foregoing, it is clear that this Court has been presented with a constitutional issue which is interwoven with "unclear" questions of state law within the meaning of Harman v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965) which could well be resolved by the Indiana courts in such fashion as to render a decision by this Court on the due process question before it unnecessary. See also: Fornaris v. Ridge Tool Co., 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970); Reetz v. Bozanich, 397 US 92, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970). The instant case, therefore, certainly falls within a recognized area for the application of the abstention doctrine in that the above mentioned Indiana statutes are susceptible to a con-

[3] Article 1, Section 12 of the Constitution of the State of Indiana provides:

"Courts open—Due course of law—Administration of justice. All courts shall be open; and every man, for injury done to him in his persons, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

struction which would modify or avoid the constitutional questions presented to this federal court for resolution. Kiernan v. Lindsay, 334 F.Supp. 588, 596-597 (S.D.N.Y. 1971), *judg. summarily aff'd* 405 U.S. 1000, 92 S.Ct. 1295, 31 L.Ed.2d 472, *reh. den.* 405 U.S. 1076. 92 S.Ct. 1497, 31 L.Ed.2d 811 (1972).

Another recognized area for federal abstention occurs where the exercise of jurisdiction would disrupt state administrative processes. *Id.* at 597. As in *Kiernan, supra,* the instant case involves the administrative process concerning the complex relationships between a state and the public employees of that state. The Administrative Adjudication and Court Review Act, if applied to the Bi-Partisan Personnel System Act, would result in a comprehensive, substantive and procedural program for determining the rights of employees of the Indiana State Highway Commission and the Commission as their public employer. See *Kiernan, supra,* at 597. Consequently, to avoid needless federal-state friction in this delicate area concerning the administrative procedures applicable to public employees, this court should stay its hand until the Indiana courts have an opportunity to resolve these important issues of Indiana law. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); Fornaris v. Ridge Tool Co., 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970); Askew v. Hargrave, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971); Kiernan v. Lindsay, 334 F.Supp. 588 (S.D.N.Y.1971), *judg. summarily aff'd* 405 U.S. 1076, 92 S.Ct. 1497, 31 L.Ed.2d 811 (1971).

The propriety of avoiding such needless federal-state friction is clearly reflected by the following excerpt from a recent article by Judge Pell:

> "In the application of the classic Pullman abstention doctrine, indeed throughout abstention cases, a principal underlying factor for judicial determination is the possibility of unduly disrupting federal-state relations. Mr. Justice Frankfurter dwelt at some length on the subject in Pullman. He observed that few public interests have a higher claim on the discretion of a federal chancellor than the avoidance of needless friction with state policies. Referring to earlier cases, he stated that they reflected a doctrine of abstention appropriate to the federal system whereby the federal courts, exercising a wise discretion, restrained their authority because of scrupulous regard for the rightful independence of state governments and for the smooth working of the federal judiciary. Noting that the use of equitable powers in this sense was a contribution of the courts in furthering the harmonious relations between state and federal authority, the need was eliminated for a rigorous congressional restriction of the courts' powers." Pell, *Abstention—A Primrose Path by any other name,* 21 *DePaul L.Rev.* 926 (1972).

Accordingly, this Court does hereby abstain from deciding the merits of this cause until the Indiana courts have had an opportunity to consider the applicability of and authoritatively construe the Bi-Partisan Personnel System Act and/or the Administrative Adjudication and Court Review Act in determining whether employees of the Indiana State Highway Commission have a right to a pre-discharge hearing under Indiana law.

Supreme Court, U. S.
FILED
JUL 22 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-1544

RICHARD A. BOEHNING, individually and as Chairman Commissioner of the Indiana State Highway Commission,
JAMES S. DUMAS, individually and as Vice Chairman Commissioner of the Indiana State Highway Commission,
KERMIT GREGORY, individually and as Commissioner of the Indiana State Highway Commission,
HAROLD O. MCCUTCHAN, individually and as Commissioner of the Indiana State Highway Commission,
R. H. HARRELL, individually and as Executive Director of the Indiana State Highway Commission,
ROLAND L. KILLEBREW, individually and as Chief, Personnel Division of the Indiana State Highway Commission,
NICHOLAS VAN NDELEN, individually and as District Engineer of the Indiana State Highway Commission, and
ALBERT SCHLESSELE, individually and as Subdistrict Superintendent of Subdistrict 6-62 of the Vincennes District Highway Commission,

Petitioners,

vs.

INDIANA STATE EMPLOYEES ASSOCIATION, INC. an Indiana not-for-profit corporation, and PHYLLIS A. MUSGRAVE, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of Case	3
Argument	
I. There Is No Important Question of Federal Law Presented Nor Is There A Conflict of Decision	7
A. Abstention Generally	8
B. Unsettled Questions of State Law	10
C. Federal-State Friction	15
D. Impairment of State Functions	16
II. The Seventh Circuit Correctly Held That, Under the Principles Enunciated in	

Roth and Sindermann,
Section 6 of the Act Supports
A Legitimate Claim of Entitlement To Public Employment
Which Requires that State
Highway Employees Covered By
The Act Receive Notice And
Hearing Prior to Discharge 18

Conclusion 23

TABLE OF AUTHORITIES

Page

Cases

Askew v. Hargrave, 401 U.S. 476 (1971) 11

Baggett v. Bullitt, 377 U.S. 360, 375 (1964) 10, 18

Board of Regents v. Roth, 408 U.S. 564 (1972) 3, 7, 8, 20, 21

Detroit Edison Co. v. East China Township School District No. 3, 378 F.2d 225 (6th Cir. 1967) 17

Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972) 23

Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) 12

Harman v. Forssenius, 380 U.S. 528, 535, (1965) 13, 14, 16, 18

Hostrop v. Board of Junior College District No. 515, 471 F.2d 488 (7th Cir. 1972), cert. den. 411 U.S. 967 (1973) 23

Indiana State Employees Association, et al. v. Boehning, 357 F. Supp. 1374 (S.D. Ind. 1974) 2

Indiana State Employees Association, et al. v. Boehning, 511 F.2d 834 (7th Cir. 1975) 2, 6-7

Kiernan v. Lindsay, 334 F. Supp. 588 (S.D.N.Y. 1971) 15

Martin v. Creasy, 360 U.S. 219 (1959) 17

McNeese v. Board of Education, 373 U.S. 668, 672 (1962) 9, 14

Mitchum v. Foster, 407 U.S. 225 (1972) 10

Mondell v. Mayor and City Council of Baltimore, 356 F. Supp. 76, 77 (D. Md. 1973) 23

Monroe v. Pape, 365 U.S. 167, 174, 183 (1961) 10, 11, 16

Perry v. Sindermann, 408 U.S. 593 (1972) 3, 7, 8, 20, 22

Propper v. Clark, 337 U.S. 472, 492 (1949) 9

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 15, 16

Reetz v. Bozanich, 297 U.S. 82 (1970) 12

Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971) 11, 16

Zwickler v. Koota, 389 U.S. 241
251 (1967) 11-13, 16

Constitutional and Statutory Provisions

Fourteenth Amendment to the Constitution
of the United States 3, 12

28 U.S.C.
F.R.C.P. Rule 65(a)(2) 5

28 U.S.C. §1343(3) and (4) 2, 3

28 U.S.C. §§2201, 2202 3

42 U.S.C. §1983 2, 3, 10

IC 1971, 8-13-1.5-1 3

IC 1971, 8-13-1.5-5 3

IC 1971, 3-13-1.5-6 3, 10, 18-19

Other Authorities

Wilbur F. Pell, Jr., "Abstention--
A Primrose Path By Any Other
Name," 21 DePaul L. Rev. 926,
982-3 (1972) 9

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1544

RICHARD A. BOEHNING, individually and as Chairman Commissioner of the Indiana State Highway Commission,

JAMES S. DUMAS, individually and as Vice Chairman Commissioner of the Indiana State Highway Commission,

KERMIT GREGORY, individually and as Commissioner of the Indiana State Highway Commission,

HAROLD O. MCCUTCHAN, individually and as Commissioner of the Indiana State Highway Commission,

R. H. HARRELL, individually and as Executive Director of the Indiana State Highway Commission,

ROLAND L. KILLEBREW, individually and as Chief, Personnel Division of the Indiana State Highway Commission,

NICHOLAS VAN NIELEN, individually and as District Engineer of the Indiana State Highway Commission, and

ALBERT SCHEESSELE, individually and as Subdistrict Superintendent of Subdistrict 6-62 of the Vincennes District Highway Commission,

Petitioners,

vs.

INDIANA STATE EMPLOYEES ASSOCIATION, INC. an Indiana not-for-profit corporation, and PHYLLIS A. MUSGRAVE, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division (herein-

BEST COPY AVAILABLE

after District Court) (Petition A-11), is reported at 357 F.Supp. 1374 (S.D. Ind. 1974). The opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) (Petition, A-11) is reported at 511 F.2d 834 (7th Cir. 1975).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

The following statement of questions presented is set forth solely to clarify the issues which were adjudicated by the courts below. Respondents do not believe that the restated, clarified issues warrant review of the judgment and opinion of the Seventh Circuit.

1. Whether, in a civil rights action brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4), the Seventh Circuit correctly held that abstention by the District Court was inappropriate where:

   a. There were no unsettled questions of state law presented;

   b. There were no allegations which challenged the constitutionality of any state law;

c. There was no impairment of any state functions; and

d. There was no adequate state remedy?

2. Whether the Seventh Circuit correctly held, under the principles set forth in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), that Section 6 of the Indiana State Highway Commission Bipartisan Personnel System Act (hereinafter Act) supports a legitimate claim of entitlement to public employment which requires that state highway employees covered by the Act receive notice and hearing prior to discharge?

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States, and of the Act, IC 1971, 8-13-1.5-1 and 8-13-1.5-5 and 8-13-1.5-6 are set forth in the Petition at pp. 3-5.

Statement of the Case

This action was instituted in the District Court pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1343(3) and (4), 2201 and 2202 by the Indiana State Employees Association, Inc., a labor organization, and Phyllis A. Musgrave (hereinafter Plaintiffs),

challenging the discharge of Plaintiff Musgrave from her employment as a stockroom clerk with the Indiana State Highway Commission (hereinafter Commission). The Defendants were the members and officials of the Commission as well as the Executive Director, Chief of Personnel, a District Engineer, and a Subdistrict Superintendent (Scheessele) of the Commission.

Plaintiff Musgrave, a member of the Indiana State Employees Association, Inc., began her employment with the Commission on or about January 19, 1970, and as a Commission employee became subject to the terms and provisions of the Act regarding discharge. On or about February 5, 1973, Plaintiff Musgrave was informed by Defendant Scheessele that her employment with the Commission would be terminated effective February 13, 1973. Plaintiff Musgrave thereafter demanded that a due process pretermination administrative hearing be held which the Commission denied. The particular reasons for Plaintiff Musgrave's discharge are in dispute. Defendants claimed that Plaintiff Musgrave was fired for cause in response to which Plaintiff Musgrave stated that the particular reasons were not sufficient to amount to cause under the Act. It is stipulated that Plaintiff Musgrave's political affiliation is not at issue and that the employee who replaced Plaintiff Musgrave is affiliated with the same political party as Plaintiff Musgrave.

Plaintiffs filed their Complaint on March 6, 1973, as a class action, for a declaratory judgment, injunction, damages and attorneys fees, alleging that Plaintiff Musgrave was entitled to notice and a pre-termination hearing under Section 6 of the Act before her discharge. Defendants took the position that no hearing need be held upon the request of any employee covered by the Act prior to the dismissal of such employee. Plaintiffs did not challenge the constitutionality of the Act. Accompanying their Complaint Plaintiffs filed a Motion for Temporary Restraining Order with a supporting Memorandum and Affidavits. On March 7, 1973, after a hearing, the District Court denied that Motion. On March 20, 1973, the Defendants filed their Motion to Dismiss with supporting Memorandum, in opposition to which Plaintiffs filed a Memorandum of Law on March 23, 1973.

On April 2, 1973, pursuant to Rule 65 (a)(2), Federal Rules of Civil Procedure, the hearing on the preliminary injunction was consolidated with a trial on the merits.

The matter was fully tried before the District Court on April 2, 1973, most of the facts having been previously stipulated by the parties. The District Court then took Defendants' Motion to Dismiss under advisement, and granted the Defendants permission to file an Answer which was filed on April 4, 1973, and took the entire case under advisement.

On April 13, 1973 the District Court entered its Opinion and Order abstaining from deciding the merits of the case until the Courts of the State of Indiana had had an opportunity to determine whether Plaintiff Musgrave had a right to a pre-termination hearing under Indiana law, 357 F.Supp. at 1378. The District Court did not rule on the class action allegations and denied Plaintiffs' request for attorneys' fees.

A timely appeal was filed in the Seventh Circuit, and on March 10, 1975, that Court held that the District Court should not have abstained, and reached the merits, stating that:

> "Where, as here, no such substantial question as to the applicable state law can be identified, 'abstention is equivalent to an impermissible requirement of exhaustion of state remedies.' . . . The right to a hearing under the federal constitution is the question presented in this action, and the same question would be presented if plaintiffs were required to bring an action in an Indiana court. Under these circumstances, abstention by a federal court is inappropriate.
>
> "The matter was fully tried before the district court decided to abstain. The facts are almost entirely stipulated. The parties have briefed and argued here the

> merits question whether plaintiff Musgrave had the type of interest in her employment so that her dismissal without a hearing was a denial of due process. Since there are no unresolved issues of fact relating to this question of law, we think it appropriate to decide it here." (Petition, A-5)

Additionally, the Seventh Circuit concluded that the Act "sufficiently supports a claim of entitlement to continued employment of employees in positions similar to plaintiff's" (Petition, A-7), "under the principles stated in Roth and Sindermann" (Petition A-8), "whose discharge is not based on political affiliation under Sec. 5" (Petition, A-9) of the Act. The Seventh Circuit then held that Plaintiff Musgrave was entitled to notice and a hearing before discharge, ordered Plaintiff Musgrave reinstated, and remanded the case to the District Court to determine if the Defendants were liable individually for damages. The Seventh Circuit expressed no opinion on the class action allegations and affirmed the denial of attorneys' fees.

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW PRESENTED NOR IS THERE A CONFLICT OF DECISION

A

Abstention Generally

Abstention is inappropriate in a civil rights action brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4) where (a) there are no unsettled questions of state law presented; (b) there is no constitutional challenge to the validity of any state law; (c) there was no impairment of any state functions; and (d) there was no adequate state remedy. Plaintiff's action below sought a determination as to whether, under the principles enunciated in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), Section 6 of the Act supported a legitimate claim of entitlement to public employment which required the Defendants to provide notice and grant an administrative hearing to state highway employees covered by the Act prior to the discharge of such state highway employees. Petitioners failed to designate any area of doubtful meaning or to outline any arguable construction of the Act which would, as a matter of state law, entitle the plaintiffs to a hearing or to provide a remedy for a lack of one. Additionally, petitioners stipulated that there is no challenge to the constitutionality of the Act (Petition, 5, 9). Further there is no pending state court case which presents the constitutional issue presented to the district court, or which would avoid the necessity of deciding the constitutional question.

Under these facts and circumstances, federal jurisdiction may not be declined merely because federal rights may be asserted and vindicated in some other forum. McNeese v. Board of Education, 373 U.S. 668, 672 (1962). Clearly, abstention "is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy" absent "special circumstances," Propper v. Clark, 337 U.S. 472, 492 (1949), none of which are presented in the case at bar. As observed by the Honorable Wilbur F. Pell, Jr., in his article "Abstention--A Primrose Path By Any Other Name," 21 DePaul L. Rev. 926, 982-3 (1972):

"As correctly stated in Wright v. McMann, 'it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention.' Where other types of cases may fall will be dependent to a considerable extent upon a current analysis of the public weal significance.

"The duty of the federal court, at least in the area of civil rights, has been clearly set forth in an often quoted statement of Mr. Justice Douglas in McNeese v. Board of Education.

'We would defeat those purposes [of the Civil Rights Act] if we held that assertion of a federal claim in a federal court must await an attempt

to vindicate the same claim in a state court. The First Congress created federal courts as the chief--though not always the exclusive--tribunals for enforcement of federal rights.'"

Section 1983 actions, as that before this court, "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation," Mitchum v. Foster, 407 U.S. 225 (1972). Certainly, abstention is not to be applied automatically in such actions, Baggett v. Bullitt, 377 U.S. 360, 375 (1964), especially where a state remedy, though adequate in theory, is not available in practice, Monroe v. Pape, 365 U.S. 167, 174, 183 (1961).

B

Unsettled Questions of State Law

Although the Defendants assert that the Seventh Circuit should have abstained from deciding the issue of whether a right to notice and pretermination hearing exists under Section 6 of the Act, the Defendants conspicuously fail to identify or specify any areas of doubtful meaning or to outline any arguable construction of the Act which would, as a matter of state law, entitle the plaintiffs to a hearing or to provide a remedy for a lack of one. The only contention raised by the Defendants is that the statute is "capable of being

interpreted in more than one way." (Petition, 9). However, Defendants fail to identify any ambiguous statutory interpretation; in fact, the Defendants meekly admit that "[s]uch interpretation might be that the State statute does create the requirement requested," thereafter claiming that, as a matter of "courtesy," the State courts should be allowed to make such a determination. (Petition, 9).

Contrary to Defendants' assertion, "[a]bstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim." Zwickler v. Koota, 389 U.S. 241, 251 (1967). "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, supra, 365 U.S. at 183. Decidedly, "where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the constitutional claim." Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971).

Defendants erroneously rely upon Askew v. Hargrave, 401 U.S. 476 (1971) to support abstention in the instant case. If anything, Askew identifies the weakness of Defendants' reliance. In Askew, a state court proceeding was filed subsequent to the filing of the federal action challenging a state statute on state constitutional grounds. Thus, Askew presented a situation

of a pending state court case raising "primarily state law claims under the Florida Constitution, which claims, if sustained, will obviate the necessity of determining the Fourteenth Amendment question." 401 U.S. at 478. Comparatively, in the case before this Court, no state action is pending nor is the constitutional validity of any state statute challenged.

Similar in infirmity is defendants' reliance upon Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) wherein the constitutionality of a law of the Commonwealth of Puerto Rico was challenged. Abstention was ordered to provide the Puerto Rican Supreme Court the opportunity to authoritatively construe a "rather vague Puerto Rican law." 400 U.S. at 43. Comparing Fornaris to the instant case, it is evident that (a) there is no vague state law presented for construction, and (b) no constitutional attack has been made against the Act.

Defendants have also misplaced reliance upon Reetz v. Bozanich, 397 U.S. 82 (1970) wherein nonresidents of Alaska challenged the constitutionality of certain state fishing laws on both state and federal constitutional grounds. Abstention was ordered since ". . . the nub of the whole controversy may be the state constitution," whose provisions had never been interpreted by an Alaska court, and which dealt with ". . . that same unique resource, the management of which is a matter of great state concern." 397 U.S. at 86-87. Reetz, notably, reiterated the admonition of Zwickler v. Koota,

supra, that abstention was applicable "only in narrowly limited 'special circumstances'" where "the issue of state law is uncertain."

Conclusively, the Askew-Fornaris-Reetz trilogy is inapplicable to the case at bar. Each case challenged the constitutionality of a state law, although no such challenge is presented in the case before this Court. Askew involved a pending state proceeding raising similar claims as that of a pending federal action. In the case at bar, there is no pending state action. Fornaris involved a "vague" law, while the Defendants before this Court have failed to identify any vagueness or ambiguity in the construction of the Act to avoid resolution of the underlying Roth-Sindermann issue. As succinctly stated in Harman v. Forssenius, 380 U.S. 528, 535 (1965):

> "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. . . . Thus, 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.'"

Comparable to McNeese, "[t]he right alleged is as plainly federal in nature and origin as those vindicated in" Roth and Sindermann, nor is the Roth-Sindermann federal right to notice and pretermination hearing "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." 373 U.S. at 674. Notably, Defendants have failed to show any such concept of entanglement. All that is advocated by the Defendants is that state tribunals should have the first "opportunity to consider complex statutes" (Petition, 9), although as occurred in Harman, supra, 380 U.S. at 536.

> ". . . the State does not point to any provision in the legislation which leaves 'reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutionaly adjudication, or at least materially change the nature of the problem.' Harrison v. NAACP, 360 U.S. 360 U.S. 167, 177, 3 L. ed. 2d 1152, 1158, 79 S. Ct. 1025."

which led to rejection of such argument as having "little force."

Accordingly, it is evident that the Seventh Circuit correctly held that abstention by the District Court was inappropriate in the absence of any constitutional challenge to the validity of a state law, and in the absence of any vague or ambiguous state statutory construction of the Act in question.

C

Federal-State Friction

The sole basis of Defendant's argument, weak and strained as it may be, is that the Seventh Circuit, in determining that Plaintiff Musgrave possessed a legitimate claim of entitlement to public employment under Section 6 of the Act, which in turn requires notice and hearing prior to discharge, determined the "rights" of hundreds of state employees to notice and pretermination hearings covered by a "valid state statute. . . which the state courts have never had the opportunity to interpret," thereby creating federal-state friction. (Petition, 12). The absence of support for Defendants' position is highlighted by their misplaced reliance upon Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (1941) and Kiernan v. Lindsay, 334 F. Supp. 588 (S.D.N.Y. 1971).

In Kiernan plaintiffs challenged the constitutionality of the no-strike provisions of the state civil service law, thereby distinguishing it from the case at bar where Plaintiffs do not seek to have any state statute declared unconstitutional; in fact, Plaintiffs support the Act and request that there be notice and an administrative hearing regarding the appropriateness of a discharge pursuant to Section 6 of the Act.

Pullman, too, involved a constitutional attack against an order of the Texas Rail-

Road Commission accompanied by a claim that the Commission's order was unauthorized under state law. The absence of a constitutional challenge to the Act before this Court readily distinguishes Pullman from the case at bar. Indeed, in Pullman the Court observed that "[i]f there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority." 312 U.S. at 501.

Without referring to any available state remedy, assuming arguendo that one even existed, Defendants are merely seeking, behind a guise of federal-state friction, to give state courts the first opportunity to adjudicate a Roth-Sindermann federal claim. This position is not only untenable, but at best is decidedly misleading and inappropriate under the facts and circumstances of this case, especially after the matter has been fully tried on the merits before the District Court. Conclusively, abstention by the District Court was inappropriate. Zwickler v. Koota; Wisconsin v. Constantineau; Monroe v. Pape; Harman v. Forssenius, supra.

D

Impairment of State Functions

Although adept at affixing appellations to argumentation, Defendants still flounder

without support for their position that the exercise of federal jurisdiction in this case brings the federal judiciary into conflict with a state's administration of its own affairs, thereby impairing state functions (Petition, 13). Defendants erroneously rely on yet another case which challenged the constitutional validity of a state law permitting annexation of school districts and assumption of bond indebtedness, Detroit Edison Co., v. East China Township School District No. 3, 378 F.2d 225 (6th Cir. 1967), wherein the Court held that ". . .abstention is particularly appropriate in this case since the assumption proceeding allegedly failed to conform to state law and since certain sections of the school code pursuant to which the proceedings were conducted allegedly contravened the state constitution." 378 F.2d at 230.

Equally as infirm is Defendants' reliance upon Martin v. Creasy, 360 U.S. 219 (1959) where plaintiffs challenged the constitutional validity of a state law which allegedly did not provide compensation for loss of access to a planned highway. Martin, however, presented the additional distinguishing feature of a pending state court proceeding and procedure to guard and protect the plaintiffs' constitutional rights. None of the factors present in Martin are present in the case before this Court.

Plaintiffs emphasize that they have not challenged the constitutional validity of

Section 6 of the Act. Rather, Plaintiffs seek to enforce their federal constitutional claim, under the principles of Roth and Sindermann, to notice and a pretermination hearing under the Act. In this regard, the Seventh Circuit correctly performed its "duty" to order the District Court to exercise its properly invoked jurisdiction. Baggett v. Bullitt, 377 U.S. at 375-379; Harman v. Forssenius, supra.

Since there is no conflict of decision regarding the abstention issue, and in view of the fact that the abstention issue in cases of this nature has been settled by this Court as hereinbefore set forth, and since the Seventh Circuit correctly followed this Court's abstention decisions, the petition for writ of certiorari should be denied.

II

THE SEVENTH CIRCUIT CORRECTLY HELD THAT, UNDER THE PRINCIPLES ENUNCIATED IN ROTH AND SINDERMANN, SECTION 6 OF THE ACT SUPPORTS A LEGITIMATE CLAIM OF ENTITLEMENT TO PUBLIC EMPLOYMENT WHICH REQUIRES THAT STATE HIGHWAY EMPLOYEES COVERED BY THE ACT RECEIVE NOTICE AND HEARING PRIOR TO DISCHARGE

Section 6 of the Act provides:

"Any employee may be dismissed, demoted, suspended or laid off for cause. For the purpose of this chapter cause shall be any action or

inaction of any employee that produces, incurs or results in the substantial diminution of the employee's ability or willingness to perform his duties, impairs the ability or willingness of any other employee of the institution or agency of state government to perform his duties or brings discredit upon the State of Indiana. Cause may include but shall not be limited to the following:

Intoxication on the job, physical or mental inability to perform the job requirements; personality characteristics which substantially limit the employee's or his fellow employee's ability to perform his duties, or which severely handicap the administration of the commission; and, action or inaction which severely limits or prohibits the implementation of administrative policies."

As the Seventh Circuit correctly observed, Section 5 of the Act, "which authorizes dismissal of employees on account of their political affiliation for the purpose of achieving a balance of the proportion of employees adhering to different political parties" (Petition, A-7,8), is not applicable to the case at bar since the Defendants have stipulated that Plaintiff Musgrave's political affiliation is not at issue and that the employee who replaced Plaintiff Musgrave is affiliated with the same political party as the Plaintiff (Petition, A-6). Accordingly, Defendants'

reliance on a patronage argument (Petition, 16) is not only improper but unduly deceptive.

In light of Roth and Sindermann, the Seventh Circuit, after a full trial on the merits was held in the District Court, correctly addressed itself to the issue of whether the Act conferred a legitimate claim of entitlement to Plaintiff Musgrave's continued public employment so as to require notice and hearing prior to dismissal. As Roth held:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests--property interests--may take many forms." 408 U.S. at 576.

To have a property interest protected by procedural due process, a person must "have a legitimate claim of entitlement to it." 408 U.S. at 577. As correctly observed and applied in this case by the Seventh Circuit, quoting Roth:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Emphasis supplied)

Clearly, a statutory provision for the continuance of public employment absent misconduct as provided in section 6 of the Act gives rise to the "claim of entitlement" to the job, which in turn gives rise to the due process and equal protection rights entitling the employee to notice and hearing on whether the specified statutory conditions have occurred. As the Court pointed out in Roth:

> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 119, 91 S. Ct. 780. "While '[m]any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations [and this is not one] due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." Bell v. Burson, 402 U.S. 535, 542, 29 L. Ed. 2d 90, 96, 91 S. Ct. 1586. 408 U.S. at 570 (fn. 7).

Thus, proof of the legitimacy of a claim of entitlement to public employment "would

obligate . . . officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." Perry v. Sindermann, supra, 408 U.S. at 603. Having correctly followed the decisions of this Court, the Seventh Circuit held that:

> "We conclude that the Indiana State Highway Commission Bipartisan Personnel System Act sufficiently supports a claim of entitlement to continued employment of employees in positions similar to plaintiff's. Section 6 of the Act authorizes dismissal for cause, and described the type of conduct which constitutes cause.
>
> "The specification of authority to discharge for two types of grounds in Secs. 5 and 6 of the Act clearly implies exclusion of other grounds. In our judgment the limitation to these two types of grounds are sufficient to support a claim of entitlement under the principles stated in Roth and Sindermann. This surely must be true in the case of an employee whose discharge is not based on political affiliation under Sec. 5. It follows that plaintiff Musgrave was entitled to notice and hearing before discharge." (Petition A-6-9).

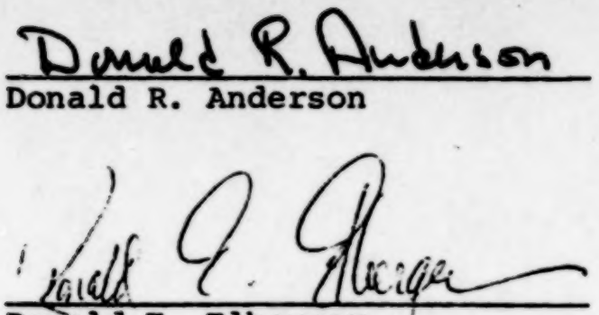
The decisions of this Court and of the Seventh Circuit are in accord. Indeed,

decisions in other circuits similarly support the decision of the Seventh Circuit in the case at bar. In Mondell v. Mayor and City Council of Baltimore, 356 F. Supp. 76, 77 (D.Md. 1973) where Section 118 of the Baltimore City Charter provided that an employee may be discharged for "cause" but no hearing was provided for, the court found that the word "cause" gave rise to an entitlement which required a pretermination administrative hearing. Similarly, legislative protection under the Veterans' Preference Act has been held to constitute entitlement sufficient to invoke due process protections for a person in the "excepted service" (i.e. outside the scope of the Civil Service Rules and Regulations) when their position was "eliminated" by the Air Force in Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972). See, also, Hostrop v. Board of Junior College District No. 515, 471 F.2d 488 (7th Cir. 1972), cert. den. 411 U.S. 967 (1973).

In the absence of any conflict of decision, none of which have been designated by the Defendants, and in view of the Seventh Circuit's correct application of the principles enunciated in Roth and Sindermann, the petition for writ of certiorari should be denied.

Conclusion

For the reasons hereinbefore set forth, it is respectfully submitted that the petition for writ of certiorari should be denied.



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